IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPLICATION NO. 204 OF 2000.

The Commissioner of Income-tax,
Mumbai City-XIII, Mumbai. ... Applicant.

V/s.

M/s Asar Brothers ... Respondent.

Shri Parag Vyas i/b R.N. Bandopadhyay for the applicant.

CORAM : V.C.DAGA AND J.P. DEVADHAR, JJ.

DATED : 29th August 2005.

P.C. :

. Heard learned Counsel appearing for the Revenue. This is an application for reference under section 256 (2) of the Income-tax Act, 1961 seeking reference of the following questions for opinion of this Court:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee is entitled to the deduction of Rs. 7,04,403/- u/s 80-HHC of the I.T. Act, without appreciating the fact that the income of the assessee is inclusive of interest income which has also been considered by the assessee for claiming deduction under section 80-HHC of the Act?"

. The Tribunal while dealing with the aforesaid question has recorded its finding as under:

"It is now stated in the proposed question as well as in the Annexure to the Reference Application that the Tribunal, while holding that the assessee is entitled to the deduction did not appreciate the fact that the income of the assessee was inclusive of interest income of Rs.6,79,635/- which has also been considered by the assessee for claiming deduction u/s 80-HHC, which is not permissible. A perusal of the paper-book filed by the assessee (when the appeal was heard) shows while claiming deduction of Rs. 7,04,403/- u/s 80-HHC in the revised return, the assessee also included the interest income of Rs. 6,79,636/- on the surplus fund available to it. The revised return, the statement of revised total return, the details of the claim under sec. 80-HHC, the audit report etc. were all before the income authorities and while rejecting the claim, they did not even mention that the claim to the extent of interest income cannot, at any rate, be allowed. It appears to us that they did not look into the details of the assessee's working in their anxiety to dismiss the claim even in the threshold. Not only the AO but also the CIT (Appeals), who has plenary powers while disposing of the appeal, did not look into the aspect and did not raise any objection to the working of the deduction. Even before the Tribunal, no argument was raised on behalf of the revenue that even assuming that the assessee's claim in the revised return is to be entertained, the same can be entertained only with reference to the other income and not with reference to the interest income. In order to assure ourselves that no such argument had been addressed before us, we have consulted the log book relating to the date of hearing of the appeal i.e. 19.11.1997 (Vol.1 page 184-185 of JM's log book). Since the aspect that while claiming deduction, the assessee has claimed deduction also in respect of interest income, has not been subject-matter of examination or adjudication in the course of assessment proceedings in the course of appellate proceedings before the CIT(Appeals) as well as before the Tribunal, nor was any argument advanced before the Tribunal on the aspect, we fail to see how the proposed question arises out of the order of the Tribunal. We, therefore, decline to refer the question and reject the Reference Application."

. The aforesaid quoted portion of the order would unequivocally go to show that at no point of time an argument was advanced by the Revenue before the Tribunal that interest, which according to the Revenue, ought to have been excluded while considering the benefit given under section 80-HHC since had no linkage with the export activities. In the absence of any challenge to the assessment on this count, we do not think that the Tribunal was in error in taking into account the interest component while considering the claim of the assessee for deduction under section 80-HHC. Reliance placed by the Revenue on the decision in the case of CIT vs. S.G. Jhaveri Consultancy Ltd. (2000) 245 ITR 854 is misplaced. In that case, this Court had relied upon the earlier judgment of this Court in the case of CIT vs. K.K.Doshi & Co. (2001) 245 ITR 849, wherein this Court had ruled that the receipts like interest, commission etc. could not have been included in the business profits as the said items did not have any linkage with the export activities. No such contention was raised in the case on hand as such order of the Tribunal does not give rise to the question of law sought to be raised herein. Application is, therefore, dismissed in limine with no order as to costs.

(J.P. DEVADHAR,J.) **(V.C. DAGA,J.)**